IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 1168 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAJESHREEBEN DHARMENDRABHAI PATADIA

Versus

STATE OF GUJARAT

Appearance:

MR CL SONI for Petitioner

MR SAMIR DAVE, APP for Respondent No. 1

MR JC GOHIL for Respondent No. 2, 3, 4, 5

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 27/03/2001

ORAL JUDGEMENT

#. By this petition under Section 407 of Criminal Procedure Code, 1973, the petitioner is praying for

transfer of criminal case No.3360/98 from the court of Judicial Magistrate, First Class (Joint Court) at Khambhat to the court of Judicial Magistrate, First Class at Surendranagar.

#. The facts of the case are that the petitioner married respondent No.2 before about ten years. She has given birth to two children. The husband and in-laws were not happy with the petitioner as she has given birth to female child. The respondents No.2 to 5 started to give all ill treatment to her. The dowry demand has also been made from her. She could not satisfy the demands and as a result of which continued to face all sort of harassment and cruelties. It is stated that during these ten years' married life, she was allowed to stay at matrimonial home only for two to three years and on many occasions she was driven away from matrimonial home. On 9th August, 1998, as what it is stated in paragraph-3 of the petition, the petitioner was put to acute cruelty by the in-laws because of which she got burn injuries to the extent of 27%. The petitioner was not shifted to hospital for treatment by the in-laws and it was only when the brother of the petitioner was informed and he rushed to Khambhat and she was shifted to hospital by him. The brother of the petitioner was informed by the owner of one STD/PCO booth. On 9th August, 1998, the petitioner filed a complaint in Khambhat City Police Station being I C.R. No.0084/98 against the respondents No.2 to 5 under Section 498A and 114 of the Indian Penal Code. On the basis of said complaint, the respondents No.2 to 5 were arrested but later on released on bail by the court. The petitioner was shifted to Surendranagar by her brother where in C.J.hospital, the petitioner got treatment. The petitioner is staying with her brother and father at Surendranagar. At Surendranagar, the petitioner filed an application for maintenance under Section 125 of Criminal Procedure Code. However, it is stated that the learned Judicial Magistrate has not granted any maintenance and her application has been rejected. In the criminal complaint filed by petitioner, investigation has been completed and chargesheet has been submitted in the court where it is registered as Criminal Case No.3360/98 in the court of Judicial Magistrate, First Class, Khambhat (Joint Court). The petitioner received summons to remain present in the case on 28.2.2001. It is stated that the petitioner is an unfortunate lady who after a span of ten years' marriage life has got only harassment and cruelty from her in-laws. It is unfortunate what it is stated that she was subjected to all this harassment and cruelty only after giving birth to female child. The husband of the

petitioner is an officer in the bank earning more than Rs.10,000/= p.m. The petitioner is a lady without any support except that she is depending wholly on the mercy of brother and father. It is stated that she is not in a position to undertake any travelling to Khambhat to attend the case due to her financial condition. Her brother is also not in a position to go everytime with her to attend the said criminal case. It is beyond the means of the petitioner everytime to go to Khambhat to attend the criminal case. The respondents No.2 to 5 are stated to be well off and earning handsome amount every month. It is also apprehended that in case she goes to attend criminal case at Khambhat, she would face bad weather and may not be in a position to freely give evidence in the criminal case. She has also not been awarded any maintenance by the learned Judicial Magistrate.

#. The learned counsel for respondents No.2 to 5 has strongly opposed this application. In support of his contention, he placed reliance on the decision of the apex court in the case of Mrs.Maneka Sanjay Gandhi and anr. v. Miss Rani Jethamalani reported in AIR 1989 SC 468 and in the case of Jamuna Kanth Jha v. Rudra Kumar Jha and ors. reported in Criminal Law Journal Reports, 1919, Patna, 648. It is contended that the whole case is concocted and manufactured one. It is self inflicted burn injury by the petitioner only with the object and purpose to falsely implicate the respondents No.2 to 5 in the criminal case. It is a case which has been filed by petitioner with an oblique motive and purpose.

#. The respondents No.2 to 5 have not cared to file reply to the Cr. Misc. Application and as a consequence thereof, the averments made by petitioner in the application stand uncontroverted.

#. The learned counsel for the petitioner, on the other hand, contended that the petitioner is not receiving any maintenance. She is financially very weak and she is not in a position to bear out the expenses of travelling to Khambhat from Surendranagar. It is also stated that she being a lady, she has to go with some male member of the family and her brother is not in a position to go everytime with her. No other person is there in the family to take care of this litigation as the father of the petitioner is an old man. The learned counsel for the petitioner submitted that the cases on which reliance has been placed by learned counsel for respondents No.2 to 5 are not applicable to the facts of this case.

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. The petitioner is staying with her brother and father at Surendranagar is not in dispute. It is also not in dispute that she filed a complaint against respondents No.2 to 5 for the offence under Section 498A and 114 of the Indian Penal Code. In connection with this complaint, they have been arrested and on investigation thereof, prima-facie police found a case against these persons and a chargesheet has been submitted in the court at Khambhat. The learned counsel for respondents No.2 to 5 does not dispute that the petitioner filed an application at Surendranagar for maintenance under Section 125 of Cr.P.C. but that application came to be rejected. It is not the case of respondents No.2 to 5 that the petitioner is having source of income, she is either in gainful employment or doing some business or having some fixed assets and therefrom, getting regular income. It is also not in dispute that the marriage of the petitioner with respondent No.2 was solemnized at Surendranagar.

#. The learned counsel for the petitioner, with all vehemence at his command, contended that the petitioner is a poor lady, has no means to afford expenses of travelling and as a result of which, she is not in a position to go to Khambhat. If what it is stated is correct, I fail to see any reason or ground why this lady has not taken the benefit of free legal services available to her. If she is not having any money or source of income and not even awarded maintenance, she could not have afforded to engage an advocate and file this criminal misc. application through him. She filed this application through advocate, meaning thereby, she has not availed of the statutory right available to her under the Legal Services Authority Act, 1985. From this fact, two inferences reasonably follow, namely, firstly that she has sufficient means to bear out the heavy expenses of litigation and secondly that she does not now about her this right of free legal services available to her under the Legal Services Authority Act, 1985. So far as the first inference is concerned, it can not be drawn in the facts of this case and the reason is very obvious. It is not the case of respondents No.2 to 5, which is to be stated at the cost of repetition, that the petitioner has her own means to maintain herself as well as to bear out the expenses of litigation. It is also not the case of respondents No.2 to 5 that she has any fixed assets wherefrom she is drawing any regular income. Her application under Section 125 of Cr.P.C. for maintenance

where maximum amount could have been awarded of Rs.500/= has also been rejected. In these facts, it is to be accepted that the petitioner has no means whatsoever to bear out the expenses of litigation which is very very heavy now a days. In this case, only second inference can reasonably be drawn that either this litigant lady is not aware of her right to get free legal services guaranteed to her under the Act aforesaid or she has not been made known of her this right by the concerned persons. There is every possibility that the petitioner may no know of her right of free legal services as guaranteed to her under the Act aforesaid.

#. Be that as it may, it is the duty of all concerned as and when a litigant of this category approach to them, to make her known of this legal right guaranteed to her under the Act, 1985. The members of the Bar who are also the officers of the court, are equally concerned with this programme of providing free legal aid services to those persons who are entitled for the same under Section 12 of the Legal Services Authority Act, 1985. The members of the Bar deserve appreciation that they are very cooperative in our programmes, i.e. Lok Adalats as well as legal literacy camps, where while delivering lectures, they make this class of litigants known of their right of free legal services. However, despite of all these things, what I am constrained to observe is that in substantial number of cases, this category of litigants are coming up in the court through advocates. It is difficult to accept that in all the cases of this category, the litigants are being provided free legal services by the Advocates. Our duty to make known and aware the litigants of this category of their right of free legal services as guaranteed to them under Legal Services Authority Act, 1985, does not end in literacy camps. It may not be gainsaid that literacy camps are not giving 100% result which is clearly borne out from the fact as stated earlier that in majority of cases, litigants are coming up through advocates. This is a continuous programme and as and when a litigant of this category approaches the advocate, it is expected from him first to let her know that she is entitled for free legal services and she may approach, in the case in this court to the Gujarat High Court Legal Services Committee. It is also expected from the advocates to ascertain whether the litigant of this category is in a position to bear out the expenses of litigation or not. After making her known of her this legal right, still if she insists that she does not want to take free legal services and wants to engage advocate, the matter is different. Whether it has been done or not, it is a different matter how the

court may know of what ultimately transpired between this litigant and the advocate. It is expected from the advocate who is filing matter in the court for this category of litigant to specifically mention in the matter that she has been told of her legal right of free legal services and she declined to avail of that right. The advocate may also give a certificate of his satisfaction, re.: financial position of this category of litigant. It is expected that till this stage, the advocate may not charge any fees from this class of litigants. When this matter comes up before the court, the court concerned may also make endeavour to ascertain whether what it is stated is correct or not and if the client is present, she may be told of her right of free legal services and to ascertain whether she is in a position to bear out the expenses of litigation or not. Still at this stage, she insists for engaging the advocate of her own and where the court is satisfied that she is in a position to bear out the expenses of litigation, that course may be permitted to be adopted by her. In a case where the court is satisfied even where she insists to continue that advocate, that she is not in a position to bear the expenses of litigation, may ascertain from the advocate who is appearing whether he is ready to provide his professional services to her on the charge as being given by the Gujarat Legal Services Committee etc. and recommend the matter accordingly to the concerned legal services authority or committee, as the case may be. But unless it is done both by the members of the Bar and Bench, the litigants of this category who are at receiving end will not get real and effective free legal services. In the Act, 1985, for this class of litigant free legal services are available irrespective of the fact whether or not she has sufficient means to bear out the expenses of litigation. It is a Legislature mandate to provide free legal service to women but if we go by the realities which can be ascertained from the cases coming everyday before the court of this class of litigants that they are not availing of this right guaranteed to them.

##. Law is made for the benefit of this class of persons and if the beneficiaries are not getting the benefit of the same, it is a serious matter and we have to make all endeavour and efforts to see that this class of persons get benefit of their this legal right. This is one of the way and manner in which we can make known to them of this legal right and if it is done, I am confident that this class of litigants will get legal right guaranteed to them under the Act aforesaid.

##. Section 407 of the Criminal Procedure Code, 1973, empowers this court wherever it is made to appear to it that it is expedient for the ends of justice for transfer of the case from one court to another court. This power of transfer of the case from one court to another court is also available to this court in a case where this transfer will tend to general convenience of the parties or witnesses. In the case in hand and the fact that the normal life of litigation in the court is sufficiently long, this petitioner has to bear out heavy expenses of travelling from Surendranagar to Khambhat. The learned counsel for the petitioner submits and which has not been disputed by learned counsel for respondents No.2 to 5 that Khambhat is at a distance of about 200 kms. from Surendranagar. The petitioner being a lady, her approach may not be unreasonable where she desires to come with some male member to attend the court at Khambhat. Naturally, it will result in double expenses. It is not unknown to our system that on many of the dates, cases are adjourned though the parties are present. Compared to this, the respondents No.2 to 5 are the persons of means, the husband of the petitioner is a bank officer and he is in a position to bear out the expenses of travelling from Khambhat to Surendranagar. He is also male and there may be little inconvenience and difficulty for him, his witnesses as well as other accused to travel from Khambhat to Surendranagar. The learned counsel for respondents No. 2 to 5 laid much stress on the fact that the accused No.5 is a woman and she is suffering from long ailments and in fact, not in a position to undertake journey from Khambhat to Surendranagar. Only on this ground it is difficult to reject the case of the petitioner. She can apply to the court concerned for her exemption from personal attendance as and when any difficulty is there with her to come to the court. The petitioner is not getting maintenance also from the husband. It is also not the case of the learned counsel for respondents No.2 to 5 that she can get the amount of expenses of travelling to and fro from Surendranagar to Khambhat from legal services authority. She can be given free legal services, i.e. advocate fees as well as expenses of typing etc. but not for this travelling expenses as well as other miscellaneous expenses. It is not a simple matter of travelling expenses which are to be borne out by this lady but other heavy expenses for boarding and lodging also.

##. In the facts of this case and looking to the financial condition of this lady, I am satisfied that if the case is allowed to continue at Khambhat, it is not expedient for the ends of justice. Transfer of the case

from Khambhat to Surendranagar will meet the ends of justice. If we go by the convenience of the parties in the criminal case, the balance tilts in favour of the petitioner. It is unfortunate that the respondent No.2, though a bank officer, has opposed the application of the petitioner filed for maintenance, however, nothing can be said on merits of the matter of maintenance as the order of the judicial magistrate rejecting her application filed under section 125 of Criminal Procedure Code is not final. There are all the possibility that the matter may be sub-judice in the revisional court.

##. The decision of the Hon'ble Supreme Court on which strong reliance has been placed is not of any help to the petitioner. This case is under Section 406 of Cr.P.C. It is not the case where the petitioner is praying for transfer of the case on the ground of absence of congenial atmosphere for fair and impartial trial at Khambhat. So far as the case of Orissa High Court is concerned, it is difficult to concur with the view taken therein. The petitioner here is not only a complainant but also a victim in the criminal case. This offence is under Section 498A and 114 of Indian Penal Code and if the view taken by Orissa High Court is applied to this case, it will result in causing serious prejudice to her. Moreover, it is a case where the matter pertains to transfer of case under Section 407 of Cr.P.C. whereunder it is the court's discretion to transfer the case. Sub-section 2 of Section 407 of the Code is also relevant. This court may act under this section on the report of the lower court or on the application of the parties interested or on its own initiative. This application is maintainable at the instance of the party interested and certainly the petitioner in the case before the lower court is a party interested.

##. In the result this criminal misc. application succeeds and the same is allowed and the Criminal Case No.3360/98 is transferred from the court of Judicial Magistrate, First Class (Joint Court) at Khambhat to the court of Judicial Magistrate, First Class at Surendranagar. Rule is made absolute accordingly. As the petitioner is entitled for free legal services and she has not availed of the same and on her own engaged the advocate, no order as to costs.

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(sunil)